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No. 86-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,

Appellant,

—v.—

AMERICAN BOOKSELLERS ASSOCIATION, INC., *ET AL.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, *AMICI CURIAE*

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Questions Presented

Virginia amended its juvenile obscenity statute in 1985 to criminalize the display of any book (in bookstores, airport shops, or wherever books are sold) where it "may" be examined and perused by any minor if the book is "harmful to juveniles." The amendment constrains booksellers, on pain of criminal sanctions, to restructure their physical premises, reallocate employee effort, or decline to stock and sell such books.

1. Do booksellers whose activities are thereby regulated by the display amendment and publishers whose sales are thereby impaired have standing to challenge the law's constitutionality?

2. Did the courts below properly invalidate the display amendment on its face?

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Interest of *Amici Curiae*[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by the Constitution and laws of the United States. Together with its state affiliates, including the ACLU of Virginia, the ACLU has frequently appeared in this Court and many other courts, as a party itself, as counsel for litigants, and as *amicus curiae*.

For the reasons advanced by appellees and by *amicus* Freedom to Read Foundation, we agree that the 1985 amendment to Virginia's juvenile obscenity statutes plainly violates the First Amendment. By prophylactically penalizing the mere open shelving of books

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[1] Pursuant to Supreme Court rule 36.1 letters of consent to the filing of this brief have been separately lodged with this Court.

protected by the First Amendment (albeit "harmful" to certain minors) the amendment will inevitably and overbroadly prevent booksellers from freely displaying books to persons constitutionally privileged to read them, and effectively preclude access to books by thousands who would otherwise have perused and purchased them.

Of at least equal importance to the substantive danger the display amendment poses to First Amendment values, however, is the harm that would be imposed by acceptance of Virginia's argument that the federal courts below lacked judicial power to review the amendment and strike it down on its face to protect the rights in jeopardy. This argument is inconsistent with decades of Article III jurisprudence which have recognized the power of courts to grant relief in pre-enforcement challenges to statutes which

will predictably impair vital constitutional rights.

Statement of the Case

Prior to 1985, the State of Virginia maintained and actively enforced statutes prohibiting not only the sale to anyone of all materials defined as "obscene" but also the sale to certain minors of a broader range of materials that could be "harmful" to juveniles. These statutes exercised the state's full power to censor reading materials as defined by the Court in Ginsberg v. New York, 390 U.S. 629 (1968) and Miller v. California, 413 U.S. 15 (1973).

In 1985, despite the lack of any evidence suggesting that the prior law had been ineffective in accomplishing the state's interest in protecting its juveniles from material obscene as to them, the state enacted the display amendment at issue here,

expanding its regulation of printed materials by prohibiting the display of books, fully constitutionally protected for adults and mature minors, in a place where juveniles might examine or peruse them.

Booksellers and publishers whose books are sold in Virginia brought this pre-enforcement challenge shortly before the display amendment took effect. They demonstrated in the lower courts the relentless censorial havoc which the amendment would create to free access to constitutionally protected books. Because the books affected by the display amendment extend by definition well beyond the category of the legally obscene under Miller, the display amendment necessarily compels all booksellers to take one of the steps identified by the courts below: to stop selling the affected books, to ban minors from the store altogether, or to reconfigure the stores (or reallocate employee

effort) to preclude perusal of affected books by any minor. Moreover, stores will no longer be able to hire minor employees to unpack and shelve books.

The record and findings below clearly establish that the display amendment would result in diminished sales in bookstores and even in the removal of many books from the shelves of non-traditional bookstores. For example, only 10% of Bantam's books are sold in "the traditional bookstore environment." Over 90% are sold in retail outlets, such as airports, office lobbies, variety stores, drug stores, and supermarkets, and impulse sales of displayed books in such environments account for more than one-half the sales of any given paperback. J.A. 24. It is not feasible to ban children from such locations or to set up separate adults-only areas in them. The only way for these non-traditional booksellers to comply with the statute,

therefore, would be to stop carrying books protected by Miller but arguably not (as to some minors) by Ginsberg.

Summary of Argument

The Court has regularly sustained the Article III judicial power to entertain pre-enforcement challenges to criminal statutes or administrative regulations which will predictably affect a plaintiff's business operations or profits. Here, appellees amply demonstrated, and both the District Court and the Fourth Circuit found, that the display amendment would require substantial and costly changes in the operation of their business. Moreover, appellees' standing to challenge the display amendment is buttressed by their First Amendment right to freely display and grant access to constitutionally protected reading materials, and the reciprocal rights of readers to peruse and purchase

them. Where, as here, appellees' own First Amendment rights are at stake, no grounds exist, nor has Virginia suggested any, precluding adjudication of appellees' pre-enforcement First Amendment challenge.

In addition to its meritless attack on appellees' standing, Virginia has misconceived the legal standard that should govern appellees' claim on the merits. Where appellees' own rights are at stake the Court normally applies a compelling interest test to determine whether governmental regulation passes First Amendment muster. If appellees' conduct is found to be protected then the offending portion of the statute may not be applied to appellees or others engaging in similar protected activity. Only if appellees' conduct is not found protected under the compelling interest standard does the Court resort to the substantial overbreadth doctrine of Broadrick v. Oklahoma, 413 U.S.

601 (1973), to determine whether the amendment is substantially overbroad as applied to persons not before the Court.

ARGUMENT

I

BOOKSELLERS WHOSE ACTIVITIES ARE DIRECTLY REGULATED, AND BOOK PUBLISHERS WHOSE REVENUES WILL BE REDUCED AS A RESULT OF THE DISPLAY AMENDMENT, HAVE STANDING TO MAINTAIN THIS ACTION

In a wide range of contexts since at least Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court has regularly sustained the Article III judicial power to entertain pre-enforcement challenges to criminal statutes or administrative regulations which will predictably affect a plaintiff's business operations or profits. The fundamental principles on which those cases rest, sufficient in themselves to establish appellees' standing, are augmented here by the special considerations for challenges to statutes

which affect expressive First Amendment freedoms. Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984). Those considerations allow appellees here, who have standing to assert their own rights, to raise the correlative rights of adult and minor readers as well.

A. Article III Has Repeatedly Been Held Satisfied In Pre-Enforcement Challenges By Those Whose Day-To-Day Business Affairs Are Predictably Threatened By Allegedly Unconstitutional Statutes Or Regulations

To establish standing to challenge governmental action, a party must "'show that he has personally suffered some actual or threatened injury,' that the injury 'fairly can be traced to the challenged action,' and that the injury 'is likely to be redressed by a favorable decision.'" Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472

(1982) (citations omitted). The injury must be "'distinct and palpable,'" rather than "'abstract' or 'conjectural' or 'hypothetical,'" Allen v. Wright, 468 U.S. 737, 751 (1984), so that it gives the challenging party a "personal stake in the outcome of the controversy." Larson v. Valente, 456 U.S. 228, 238-39 (1982).

Because the type of injury required for standing is "not susceptible to precise definition," the application of the constitutional standing requirement cannot be reduced to a "mechanical exercise." Determining standing in any particular case relies heavily on comparison of the facts of a case to prior standing decisions, and on "clarifying principles or even clear rules developed in prior cases." Allen v. Wright, 468 U.S. at 751-52. This Court's prior decisions, and the principles and rules developed in those

decisions, clearly establish appellees' standing here.

At one end of the spectrum, the Court has denied standing under the related Article III doctrines of standing and ripeness, reasoning that the injury claimed is too conjectural and hypothetical to present a live case or controversy. In such cases, the governmental power challenged is merely discretionary, and it is far from certain that it would ever be applied to or affect the plaintiffs before the Court. Four representative cases exemplify the controlling principles.

In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the Court found no standing to review an assertion of a discretionary power to impose certain choke-holds on certain arrestees, reasoning that it was uncertain that the provision would ever again be applied to the plaintiff. In Babbitt v.

United Farm Workers, 442 U.S. 289, 304 (1979), the Court found no standing to review a discretionary power granted farm employers to bar access to farm workers by labor organizers, because it was "conjectural to anticipate that access will be denied." In Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 163 (1967), the Court found no standing to challenge a discretionary power to suspend food additive certification if manufacturers denied access to FDA inspectors, since "we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order." And in Communist Party v. SACB, 367 U.S. 1, 70, 78-79 (1961), the Court declined to review certain provisions of a statute merely authorizing the Attorney General to take specified measures concerning certain organizations.

At the other end of the spectrum lie challenges to assertions of governmental power which are not discretionary but regulatory -- i.e., intended to require businesses or particular groups to conform immediately their usual conduct to new standards of behavior.

When faced with pre-enforcement challenges to measures, whether criminal or civil, which are intended to and predictably will regulate the conduct of actors in discrete segments of society, the Court has routinely and unhesitatingly found standing. Those cases, and the rules and principles the Court has identified in them, make plain that appellees' standing here is not open to serious question.

As early as Pierce v. Society of Sisters, 268 U.S. 510 (1925), this Court granted injunctive relief against enforcement of a statute which when enacted and first

challenged would not become effective for four more years. Standing was amply established because "without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property." 268 U.S. at 531. State officials had expressed no more than a general interest in enforcing the law requiring students to attend public schools (when it would become effective four years after enactment), and the opinion of the Court discloses no specific threat against the plaintiffs. Significantly, the Court noted that the judicial power to forestall future injury which would predictably flow from such a statute was not novel even in 1925: "Prevention of impending injury by unlawful action," the Court unanimously observed, "is a well recognized function of courts of equity." 268 U.S. at 536.

Cases upholding standing for similar pre-enforcement challenges to regulatory statutes, where injury would predictably flow from compliance with the newly required norms of conduct, are legion since Pierce. Perhaps the most celebrated and carefully analyzed such decision was written by Justice Harlan for the Court in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), a companion decision to the Toilet Goods discretionary power case, discussed above at p. 12, in which standing was denied. The contrast between the two cases usefully indicates why standing is so plainly available here.

Abbott Laboratories granted a drug manufacturer standing to challenge a statute and regulations barring the sale of proprietary drugs without also placing the established generic name of the drug on the label, reasoning:

> [The regulation] has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. As the District Court found on the basis of uncontested allegations, 'Either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution . . .'
>
> [T]here is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions. Compare Columbia Broadcasting System v. United States, 316 U.S. 407; 3 Davis, Administrative Law Treatise, c. 21 (1958).

387 U.S. at 152, 154. In the companion case, Toilet Goods, Justice Harlan distinguished the discretionary power there under review, for which standing was not found, with the

mandatory regulations at issue in Abbott Laboratories, for which standing was recognized:

> The regulation challenged here is not analogous to those that were involved in Columbia Broadcasting System, supra, and Storer, supra, and those other color additive regulations with which we deal in Gardner v. Toilet Goods Assn., post, p. 167, where the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs. See also Federal Communications Comm'n v. American Broadcasting Co., 347 U.S. 284.
>
> This is not a situation in which primary conduct is affected -- when contracts must be negotiated, ingredients tested or substituted, or special records compiled. This regulation merely states that the Commissioner may authorize inspectors to examine certain processes or formulae; no advance action is required of cosmetics manufacturers.

387 U.S. at 164.

The principles applied in Pierce and Abbott Laboratories have repeatedly been invoked to uphold standing in cases where businesses or economic organizations chal-

lenge recently promulgated (or, as in Pierce, not-yet-effective) regulation which would predictably affect profits or require expenditures to conform. See, e.g., Columbia Broadcasting Sys., Inc. v. United States, 316 U.S. 407, 418-19, 422-23 (1942) (standing for network to challenge regulation barring licenses under specified conditions even though no license had in fact been denied or revoked, since such rules "have the force of law before their sanctions are invoked as well as after," and "the expected conformity to them causes injury cognizable by a court of equity"); Bantam Books v. Sullivan, 372 U.S. 58, 62 n.4 (1963) (standing for out-of-state book publishers to challenge state morality commission's notification to in-state distributor that certain books were "objectionable for . . . display for youths eighteen years of age [and younger]," even though no notices had yet been directed to

publisher); Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974) ("Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect."); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343-44 (1977) (standing for organization to challenge statute barring certain labels on shipped apples, where members' compliance with statute would require business expenditures to conform to required conduct); Babbitt v. United Farm Workers, 442 U.S. at 299-303 (standing to challenge statutory provisions regulating labor election procedures and consumer publicity, since challenged provisions were "sure to work the injury alleged" and "fear of criminal prosecution under [the] allegedly unconstitutional statute [was] not

imaginary or wholly speculative"); American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 327 (7th Cir. 1985), aff'd mem., 106 S. Ct. 1172 (1986) (standing for booksellers and publishers to bring a pre-enforcement challenge to an ordinance providing for civil rights actions against booksellers where compliance would cause booksellers not to sell constitutionally protected books).[2]

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[2] See also Frozen Food Express v. United States, 351 U.S. 40 (1956) (standing for claim that business would be affected by regulation declining to exempt plaintiff from ICC supervision); United States v. Storer Broadcasting Co., 351 U.S. 192, 198 (1956) (standing to challenge regulation that no television licenses would be granted to applicants already owning five such licenses even though no specific application was before the Commission); Baggett v. Bullitt, 377 U.S. 360 (1964) (standing for faculty and staff members to challenge statutes requiring oaths by state employees, since the statutes forced plaintiffs either to comply with arguably unconstitutional statutes or risk prosecution) (White, J.); Epperson v. Arkansas, 399 U.S. 97, 100 (1968) (standing for teacher to challenge Arkansas criminal statute barring teaching of evolution);

(Footnote continued)

The Court does not require specific enforcement measures or particularized threats against plaintiffs in such cases, as

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(Footnote continued)

Doe v. Bolton, 410 U.S. 179, 188 (1973) (standing for physicians to challenge criminal abortion statute absent particularized threats of prosecution, where the statutes challenged were "recent and not moribund"); Buckley v. Valeo, 424 U.S. 1, 11-12 (1976) (standing for individuals and organizations to challenge comprehensive election financing reform statute prior to effective date of statute, since statute intended to regulate their conduct); Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 62 (1976) (standing for physicians to challenge criminal abortion statute absent particularized threats of prosecution, since statute intended to regulate physician conduct); Pacific Gas & Elec. Co. v. Energy Resources Comm'n, 461 U.S. 190, 200-03 (1983) (standing for utilities to challenge statute imposing moratorium on certification of new nuclear power plants until development and approval of waste disposal techniques); Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 579-82 (1985) (standing for chemical companies to challenge statutory requirement that certain claims they had not yet brought be adjudicated in arbitration); Edwards v. Aguillard, 55 USLW 4860 (U.S., June 19, 1987) (standing for teachers to bring a pre-enforcement challenge to a law forbidding the teaching of evolution in public schools unless accompanied by instruction in the theory of creation science).

it does where an individual challenges a broad-based criminal statute that is neither regulatory in nature nor aimed at a discrete segment of the population. Cf. Steffel v. Thompson, 415 U.S. 452 (1974). The recent enactment of a regulatory measure itself provides the certainty that enforcement is intended; the legal obligation to comply with the regulatory measure creates direct and immediate injury-in-fact. A "case or controversy" exists by virtue of the governmental demand that economic actors conform their usual conduct to new standards of behavior that are arguably illegal or unconstitutional. The traditional powers of equity, and the Declaratory Judgment Act whose very purpose was to provide "an alternative to pursuit of the arguably illegal activity," S. Rep. No. 1005, 73rd Cong. 2d Sess., 2-3 (1934), quoted in Steffel v. Thompson, 415 U.S. at 480 n.1 (Rehnquist, J., concurring),

amply support the judicial power to resolve such disputes prior to actual enforcement.

B. Appellees Have Standing Under The Pre-Enforcement Regulatory Standing Cases

Appellees -- the American Booksellers Association, the Association of American Publishers, the Council for Periodical Distributors Association, the National Association of College Stores, and two retail book stores in Virginia -- plainly have standing under the decisions and principles canvassed above. The District Court's finding of fact, undisturbed by the Court of Appeals, establish that

> the average general bookstore in the Northern Virginia area carries a significant percentage of materials (varying between 5-25%) that are "harmful to juveniles" as defined in the statute. The books that fall within the restrictions come from a wide variety of subject matters, such as romance, fiction, photography, best sellers, science fiction and health. Most of these books come

> within the statute's fairly broad ambit on the basis of their content. However, the Court finds that the covers of some books and magazines, as sexually explicit "pictures" and "photographs" under the statute, are also covered by the statute.
>
> In order to comply with the 1985 amendment, bookstores are faced with approximately four choices. First, a bookstore could simply bar all persons under the age of 18 from its store. . . .
>
> Second, the store could create an "adult only" section in order to display the proscribed material. . . .
>
> Third, the bookstore could simply limit its inventory to books not regulated by the new law. . . .
>
> Finally, the bookstore could place all of the proscribed material behind a counter where they would not be displayed to the public.

617 F. Supp. 699, 702-03 (E.D. Va. 1985).

The Court of Appeals properly analyzed these facts, and the impact of the ordinance on booksellers in Virginia (and by extension

the impact on periodical distributors and publishers as well).

> We agree with the district court that the Booksellers have standing to challenge the amendment. The Booksellers have shown a legitimate concern that the amendment will be implemented so as to infringe on their first amendment right of "free speech." This is more than a concern merely "held in common by all members of the public." Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 220 (1974). There is little doubt that compliance with the amendment threatens the Booksellers with economic injury; each of the methods of compliance suggested by the Commonwealth would interfere with the Booksellers' marketing methods. See Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970). Additionally, the mere display of proscribed materials in a manner allowing juveniles access violates the statute. To avoid criminal liability, the Booksellers must evaluate the content of all types of printed matter and then prevent minors from having the opportunity to examine and peruse those materials deemed harmful.

> If the Booksellers attempt to comply with the amendment, they face economic injury; if the booksellers continue to conduct their business in their normal fashion, they face the prospect of prosecution.

802 F.2d 691, 694 (4th Cir. 1986).[3] These facts are virtually indistinguishable from those in Abbott Laboratories v. Gardner, Hunt v. Washington State Apple Advertising Comm'n, Babbitt v. United Farm Workers, and the other cases cited above at pp. 17-21. In the language of Abbott Laboratories, booksellers in Virginia:

> either . . . must comply with the . . . requirement and incur the costs of changing over their [practices] or they must follow their present course and risk prosecution . . . [T]he regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail [to do so] they are quite clearly exposed to the imposition of strong sanctions.

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[3] The standing of the organizational appellees are more fully discussed infra at 29-30.

387 U.S. at 152, 154.

Contrary to Virginia's hypertechnical attempt to undercut the findings of fact on which both standing determinations below rests, see Edwards v. Aquillard, 55 USLW 4860 (U.S., June 19, 1987) (White, J., concurring), there was no need for a lengthy trial to arrive at a list of particular books affected, or to await the display amendment's effective date. The display amendment was not legislation in the air, or an authorization of governmental actions that might never be used. It was intended to go beyond Virginia's existing prohibition on sales to minors by barring display of such books "in a manner whereby juveniles may examine and peruse" them.

C. First Amendment Considerations Buttress Appellees' Standing To Raise Their Own Rights And The Rights of Readers

Compounding its confusion over how the overbreadth doctrine applies to the merits, which we address in Point II below, the Commonwealth of Virginia contends that appellees lack "standing" to raise the rights of others (whether other booksellers and publishers or readers). They reach this conclusion by purporting to "balance" the overbreadth doctrine against some defined interest in "comity."

Virginia's argument is at odds with numerous decisions of this Court, which make clear that appellee booksellers and publishers are entitled to claim that the display amendment is not a valid restriction of protected expressive activity -- their own and that of readers and other booksellers and publishers -- because it "reaches too far,"

Brockett v. Spokane Arcades, 472 U.S. 491, 504 (1985), and is not narrowly tailored to advance the compelling governmental purpose the state identifies.

Virginia's disquisition on third-party standing also addresses an issue not presented. As organizations of publishers and booksellers whose members will be predictably injured by enforcement of the display amendment, appellees' own rights and interests are coextensive with those of sellers and publishers of books in Virginia (who may not be members) and of readers. Since Bantam Books v. Sullivan, 372 U.S. at 58, the Court has recognized that the rights of readers are precisely reciprocal to those of publishers or booksellers. The First Amendment right of a publisher to have its books perused by and sold to readers without governmental interference, or of a bookseller to sell books free of such interference, is simply the other side of the right of readers

to peruse and purchase those books. As Professor Emerson reminds us, the First Amendment guarantees not just individual rights in isolation, but a system of free expression.

Accordingly, in considering previous restrictions on First Amendment activity, the Court has consistently considered the interests of both readers and booksellers (or more generally, audience and speakers) interchangeably, without engaging in the prudential standing analysis that is required in other contexts where the rights of a plaintiff are not inextricably intertwined with others. See, e.g., Brockett v. Spokane Arcades, 472 U.S. at 491 (considering challenge by movie theater owners to overly broad obscenity statute); Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977) (the right of a speaker to engage in commercial speech is reciprocal to the substantial interest of the listener

"in assuring informed and reliable decision-making"); Kleindienst v. Mandel, 408 U.S. 753 (1972) (inviter's First Amendment rights reciprocal to those invitees would have if they were citizens); Procunier v. Martinez, 416 U.S. 396 (1974) (letter recipient's standing to raise interests of senders); see also Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 958-59 (1984) (adjudication of the facial validity of a statute necessarily entails consideration of the statute's breadth, but no "standing" question is thereby presented). Thus, the Court need not undertake the prudential third-party standing analysis of Warth v. Seldin, 422 U.S. 490 (1975); appellees' challenge already and necessarily squarely and fully presents the relevant considerations.

Even if the prudential standing issue were raised, moreover, appellees' ability to invoke the First Amendment interests of

others as a basis for striking down the display amendment on its face follows directly from Secretary of State v. Munson, 467 U.S. at 955-58. There, in lieu of determining whether a Maryland statute regulating charitable solicitation affected a paid professional fundraiser's own First Amendment rights, the Court squarely held:

> [W]here the claim is that a statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert the rights of another without regard to the ability of the other to assert his own claims and "'with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" Broadrick v. Oklahoma, 413 U.S., at 612, quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). See also Schaumburg, 444 U.S., at 634 ("Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court").

> The fact that, because Munson is not a charity, there might not be a possibility that the challenged statute could restrict Munson's own First Amendment rights does not alter the analysis. Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society -- to prevent the statute from chilling the First Amendment rights of other parties not before the court. Munson's ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake. The crucial issues are whether Munson satisfies the requirement of "injury-in-fact," and whether it can be expected satisfactorily to frame the issues in the case. If so, there is no reason that Munson need also be a charity. If not, Munson could not bring this challenge even if it were a charity.

467 U.S. at 957-58. See also id. at 957 n.7; Craig v. Boren, 429 U.S. 190, 192-97 (1976) (considering 18-20 year-old males' rights in facial challenge by vendor of beer to validity of statutory ban on sales to such minor males); Eisenstadt v. Baird, 405 U.S. 438,

443-46 (1972) (considering minor's interests in facial challenge by advocate who distributed contraceptive foam to minor).

Since appellees do not rely solely on these third-party interests, as did Munson, the beer vendor in Craig, and Baird, but are instead seeking to vindicate their own First Amendment rights, their standing to raise the question whether the display amendment overbroadly infringes First Amendment rights of booksellers, publishers, and readers generally is even clearer here than in those cases. Short of overruling Munson and a host of its predecessors, there is simply no basis -- certainly Virginia suggests none -- that would warrant the Court's refusal to consider the practical impact of the display amendment on the entire range of expressive activity that it applies to and is likely to affect.

Even to analyze the issue as one of "standing" to raise third-party rights, as

Virginia has, is a misnomer, as the Court recognized in Munson. 467 U.S. at 965 n.13. There is no question that appellees have suffered injury-in-fact. Properly viewed, appellees are not seeking to vindicate claims of unspecified third parties, as to which a genuine issue of standing would arise, but rather their own individual right to have their own protected activity governed only by a constitutional statute. See Brockett v. Spokane Arcades, 472 U.S. at 504 (approving pre-enforcement facial invalidation, limited "to the extent that [the statute] reaches too far," where "the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish. . . ."); see generally Monaghan, "Overbreadth," 1981 Sup. Ct. Rev. 1 (1982), cited in Secretary of State v. Munson, 467 U.S. at 959.

II

THE DISPLAY AMENDMENT'S OVERBROAD RESTRICTION ON THE DISPLAY OF BOOKS DEFINED AS "HARMFUL TO JUVENILES" IS INVALID UNDER THE COMPELLING INTEREST STANDARD

In addition to its meritless attack on appellees' standing, Virginia has fundamentally misconceived the legal standard by which appellees' claims must be judged. This is not a case -- like Broadrick v. Oklahoma, 413 U.S. 601 (1973) or New York v. Ferber, 458 U.S. 747 (1982) -- where plaintiffs unable to assert their own rights seek invalidation of a broad statutory scheme. Instead, appellees here have shown that their own First Amendment rights will be impaired by the display amendment. Accordingly, the analysis the Court must undertake stems not from Broadrick, but rather from the core compelling interest standard applicable to statutes directly impairing a plaintiff's expressive activity. See, e.g., United States v. Grace, 461 U.S.

171 (1983); Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

To safeguard the fundamental principles of free expression, the Court routinely permits litigants to challenge statutes that, on their face, overbroadly and unconstitutionally restrict protected First Amendment activity. See, e.g., City of Houston v. Hill, 55 USLW 4823 (U.S., June 15, 1987) (ordinance prohibiting verbal interruptions of police); Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc., 55 USLW 4855 (U.S., June 15, 1987) (proscription of expressive activity at airport); Brockett v. Spokane Arcades, 472 U.S. 491 (1985) (statute proscribing the dissemination of "lewd" or "lustful" matter); United States v. Grace, 461 U.S. 171 (1983) (statute prohibiting free expression in or about the grounds of the Supreme Court); NAACP v. Button, 371 U.S. 415 (1963) (statute

designed to regulate solicitation by attorneys); Marsh v. Alabama, 326 U.S. 501 (1946) (statute designed to prohibit leafletting on the streets of a company town); Cantwell v. Connecticut, 310 U.S. 296 (1940) (statute designed and having the effect of restricting the dissemination of religious literature).

It has long been settled that when plaintiffs establish an infringement of their own protected First Amendment activities, "the state may prevail only upon showing a subordinating interest which is compelling," Bates v. City of Little Rock, 361 U.S. 516, 524 (1960), and by further showing that the means chosen to achieve the compelling interest are narrowly drawn. See Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 637-39 (1980); see, e.g., Bates v. State of Arizona, 433 U.S. at 383 (prophylactic ban on attorney advertising not narrowly tailored to achieve the state's

compelling interest in preventing the ills that flow from some advertisements). Placing the burden on the state to justify any infringement of fundamental rights by compelling necessity preserves First Amendment freedoms from statutes that "would create an unacceptable risk of the suppression of ideas," City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 797 (1984), or that would allow "the hand of the censor to become unduly heavy." New York v. Ferber, 458 U.S. 747, 756 (1982).

When the plaintiff's own First Amendment activity is protected from unconstitutional infringement, either because the statute lacks a compelling objective or because the means chosen to achieve a compelling objective are not narrowly drawn, the inquiry ends, and that portion of the state law unconstitutionally infringing on protected First Amend-

ment activity may not be applied to plaintiffs or to others.

In United States v. Grace, for example, the Court considered a criminal statute that made it "unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." 461 U.S. at 173 n.1. Because the government was unable to demonstrate that the statute as applied to conduct like plaintiffs' was narrowly tailored to serve a compelling interest, the Court facially invalidated the portion of the statute that prohibited expressive activity on the sidewalks in front of the Supreme Court building. See also Bates v. City of Little Rock, 361 U.S. 516 (invalidating statute compelling disclosure of an organization's membership list);

Speiser v. Randall, 357 U.S. 513 (1958) (invalidating statute requiring claimants for veterans' property tax exemption to declare loyalty to the United States); cf. Edwards v. Aquillard, 55 USLW 4860 (U.S., June 19, 1987) (invalidating statute requiring equal time for the teaching of creation science).

Where the state meets its burden of proving that the legislation as applied to plaintiff's own conduct is narrowly drawn to achieve a compelling state interest such that plaintiff's conduct is unprotected, or where the question of whether the plaintiff's own conduct is protected is not reached, e.g., Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc., 55 USLW at 4855, plaintiff may facially invalidate a state law, in whole or in part, only by resort to the overbreadth doctrine. See New York v.

Ferber, 458 U.S. 747, 767-74 (1982).[4]

The overbreadth doctrine supplements the usual compelling interest test by permitting a plaintiff to proceed with a facial challenge against a statute infringing on First Amendment freedoms even where conduct could have been regulated under a properly drafted statute. The doctrine reflects the Court's adherence to liberally allowing challenges to statutes that endanger First Amendment freedoms. The overbreadth doctrine, however, is an exception to "[t]he traditional

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[4] Amici recognize that the Court has, on occasion, referred to the overbreadth doctrine in cases in which the plaintiff's own conduct was constitutionally protected, as well as cases in which it was not. At least since Munson, however, it is clear that the need to demonstrate "substantial" overbreadth only applies in the latter situation. 467 U.S. at 965 n.13. When a statute lacks even a constitutional "core," and is therefore invalid "in all its applications," the Court has applied traditional compelling interest scrutiny. Id. at 967-68. That distinction, so carefully explained in Munson, id. at 964-65, is entirely overlooked by appellants here.

rule . . . that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the Court." Ferber, 458 U.S. at 767. Application of the overbreadth doctrine is tempered by the Court's concern that a plaintiff whose conduct is unprotected may bootstrap itself to others whose conduct is protected and escape prosecution even where the statute has a wide range of proper applications.

New York v. Ferber, on which Virginia principally relies, illustrates the difference between a First Amendment claim where plaintiffs are asserting their own rights and a claim that relies on the overbreadth doctrine -- a difference which Virginia's brief here simply ignores. In Ferber, the Court rejected a criminal defendant's challenge to a statute designed to prevent the exploitation of

children in the production of visual pornography. The defendant was found guilty of engaging in the dissemination of child pornography when he sold films devoted almost exclusively to depicting young boys masturbating.

The Ferber Court first concluded that the defendant's conduct was not protected speech under the compelling interest test. 458 U.S. at 753-66. Only then did the Court address the defendant's claim that because the New York statute interfered with the protected First Amendment rights of others not before the Court he should escape punishment even though his own conduct was unprotected. 458 U.S. at 767-74.

By contrast, when it facially invalidated a state disciplinary rule prophylactically banning attorney advertising in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the Court applied the compelling interest test after finding that plaintiff's own

advertising was protected by the First Amendment. 433 U.S. at 381-82. Similarly, in United States v. Grace, 461 U.S. 171, 181-82 (1983), the Court struck down that portion of the statute that applied to appellees' conduct upon finding that the plaintiffs' own conduct was protected under the compelling interest test.

Ferber, Bates and Grace make plain that the standards governing a facial challenge by a plaintiff whose conduct is found to be protected by the First Amendment are different than the standards used to evaluate a facial challenge under the overbreadth doctrine by one whose conduct is not plainly protected. Where plaintiffs' own rights are unconstitutionally infringed, the Court applies the historically developed test which places the burden on the state to prove "a compelling interest" and "a narrowly drawn statute." If plaintiffs are successful, that portion of the

statute which would have continued to interfere with protected conduct is found to be facially invalid and may not be applied either to plaintiffs or to others.

Here, whether the Court relies on the compelling interest standard or the overbreadth doctrine standard, the display amendment cannot withstand constitutional scrutiny. Even under the overbreadth doctrine, appellees amply demonstrated below, and the lower courts expressly found, that the unconstitutional applications of the display amendment would have a substantial effect on the unrestricted display of and access to constitutionally protected reading materials, and was not subject to acceptable narrowing construction.

As more fully developed in the brief submitted by appellees and by amicus Freedom to Read Foundation, we agree that the display amendment is also invalid under the compelling

interest test. A statute criminalizing the mere display of constitutionally protected books in places where anyone under eighteen has access, merely because those books might be found "harmful" to some minors, is the epitome of a statute that sweeps far too broadly.

Most significantly, no showing was made that Virginia's restriction on sales was ineffective in averting harm to minors; nevertheless, Virginia capitulated to the relentless demands of censorship by requiring measures that would necessarily and inevitably deter the perusal and purchase of books not only by certain minors for whom the books are allegedly "harmful," but by mature minors and adults as well.

Since the wholesale removal of fiction and nonfiction books from the shelves of retail outlets in Virginia or their isolation in stigmatizing "adults only" sections are

not narrowly tailored responses to meet the state interest asserted by Virginia, the display amendment is facially invalid, and the judgment of the Fourth Circuit should be affirmed.

Conclusion

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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